Filed 5/18/12 P. v. Polanco CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. OSCAR PARILLA POLANCO, Defendant and Appellant.	G044295 (Super. Ct. No. 09CF0992) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed.

Ann Bergen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Scott C. Taylor and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Oscar Polanco appeals his convictions for arson and burglary (Pen. Code, §§ 451, subd. (d), 459, 460, subd. (b)),[1] arguing there was insufficient evidence to support the charges. He also argues several errors with respect to a $2,000 restitution fine. We conclude that none of defendant's contentions have merit and therefore affirm.

I

FACTS

At the time of the events leading to the instant case, Pac West Security (Pac West) provided security services for the Villa Siena apartment complex in Irvine. Villa Siena is a gated complex with three entrances, with the main entrance manned at all times by a security guard. Several officers would be on duty at any one time, with one at the gate and the others patrolling. The complex had over 1400 units and a number of storage rooms.

Beginning in 2008, both defendant and his girlfriend, Isabel Pineda, were employed by Pac West and were assigned to Villa Siena. Defendant worked as one of the patrol officers. In March 2009, Villa Siena's management asked to have defendant removed because he was not providing the expected services. On March 5, Pac West's scheduler called defendant and asked him to come to the office because he was being reassigned. Defendant went to the office as asked, and he was offered a patrol assignment. Defendant said he wanted to think about it, and said if he did not get an assignment that he liked, he would quit. The scheduler felt he seemed disappointed and frustrated.

Later that night at around 10:00 p.m., the Orange County Fire Authority was dispatched to Villa Siena because of an automatic fire alarm. The first fire engine on the scene determined there was a fire in a storage room in an underground parking lot

[1] Subsequent statutory references are to the Penal Code.

beneath a residential building. The storage room contained items belonging to Villa Siena. When Fire Captain Steve Pardi arrived, the fire was no longer active, but residents were evacuating. Two couches in the storage room were burned. Pardi believed the fire was not accidental.

A few hours later, Pardi was again dispatched to Villa Siena, again due to a fire in a storage room belonging to Villa Siena. When Pardi arrived, the fire was no longer active, but residents had been evacuated. One couch and several mattress sets had been burned. Pardi once again believed the fire was not accidental.

The next day, Rolf Parkes of the Irvine Police Department, who was assigned as an arson investigator, went to Villa Siena to investigate the fires. He met with the general manager and asked her about possible suspects, and the manager identified defendant.

Parkes spoke with defendant at his home in Costa Mesa. Defendant stated he had gone to dinner the previous night with his girlfriend, at the restaurant "Chile's," located at the Block,[2] then returned home and was there from 9:30 p.m. for the rest of the night. Parkes asked defendant for his cell phone number, and he provided a number. At Parkes' request, defendant handed over his cell phone, which defendant said he had received from his girlfriend, and determined the actual number was different than the one defendant had provided. Defendant had two Villa Siena remote controls in his car, which would permit him access to the unmanned gates between 6:00 a.m. and 10:00 p.m.

Parkes obtained defendant's cell phone records with a search warrant. Pineda was listed as the account holder. On the night of the fires, between 5:46 p.m. and 5:28 a.m., defendant sent or received 45 text messages from another security guard at the complex, Eddie Lua. Between 9:52 p.m. and 12:51 a.m., 17 calls were made between defendant and Lua. The records indicated that between 9:29 p.m. and 12:51 a.m., calls

[2] Parkes later testified there is no Chili's restaurant at the Block.

were made from the phone while it was at or near Villa Siena. Other calls, at 10:36, 10:51, and 11:08 p.m., were made at or near his Costa Mesa home.

Parkes also interviewed Pineda. She said that on the night of the fires she and defendant went to the Block. She said she and defendant have different tastes in food, and she ate take out from Dave & Buster's in the car. She did not know where defendant ate. They came back to defendant's home thereafter and did not leave again that night. Later, during another interview, she said she fell asleep after they returned home and she was not responsible for "babysitting" defendant. When testifying at trial, her version of events was somewhat different, and she claimed that after leaving the Block, they went back to defendant's residence, but rather than spending the night, she took a nap, then defendant took her home.

In April, defendant was arrested. He spoke to Parkes and another detective thereafter. Defendant did not deny that the cell phone was his, or that he had it with him on the night of the fires. He did not say someone else had possession of the cell phone. He had no explanation for how he could have been at his home in Costa Mesa, yet his phone was four and a half miles away in Irvine. He maintained he had been home all night. The questioning stopped when defendant asked for a lawyer.

Defendant was charged with four counts. Counts one and three were for arson (§ 451, subd. (d)), and counts two and four were for second degree burglary (§§ 459, 460, subd. (b)). At the conclusion of trial, defendant was convicted on all counts. He was sentenced to two years and eight months in prison, comprised of two years for count one and eight months for count three. Sentence on counts two and four were stayed. Defendant was also ordered to pay a $2,000 restitution fine, among other fines and fees. He now appeals.

II

DISCUSSION

Substantial Evidence

"Our role in considering an insufficiency of the evidence claim is quite limited. We do not reassess the credibility of witnesses [citation], and we review the record in the light most favorable to the judgment [citation], drawing all inferences from the evidence which supports the jury's verdict. [Citation.]" (*People v. Olguin* (1999) 31 Cal.App.4th 1355, 1382.) The standard of review is the same where the prosecution relies primarily on circumstantial evidence. (*People v. Miller* (1990) 50 Cal.3d 954, 992.) Before a verdict may be set aside for insufficiency of the evidence, a party must demonstrate "'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) Defendant's arguments do not clear this high bar.

According to the relevant statute, "A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property." (§ 451.) Second degree burglary consists of unlawfully entering a structure with the intent to commit a felony. (§§ 459, 460, subd. (a).)

There was significant and substantial evidence from which the jury could find defendant committed both crimes beyond a reasonable doubt. Defendant had a motive to commit the crime, specifically, being disappointed and frustrated about being reassigned from a job he had apparently enjoyed. Further, there was circumstantial evidence connecting defendant to the crimes, specifically, the cell phone records which revealed he was at or near the location where the crimes occurred. Further, he had made a number of calls and sent text messages to another guard at the complex around the time of the fires. Defendant never denied the cell phone was in his possession. The discombobulated and conflicting statements of defendant and his girlfriend regarding

where he supposedly was that night did not call this evidence into reasonable question. He was also in possession of a remote that gave him access to the rear entrance of the complex, which he could have used to access Villa Siena before the first fire.

Defendant, relying on older cases specific to arson, argues this evidence is insufficient, but we disagree. Under general principles relating to substantial evidence, there was more than enough from which a reasonable jury could have concluded that defendant was the person who committed the arsons and burglaries on March 5 and 6.

Restitution Fine

Defendant argues the trial court erred by imposing a restitution fine that factored in the burglary convictions for which the court had stayed sentence pursuant to section 654. He also claims the court did not exercise its own discretion when it set the fine. Because his counsel did not object, he argues, he suffered from ineffective assistance of counsel.

Section 1202.4, subdivision (b) requires the court, unless it finds a compelling reason for not doing so, to "impose a separate and additional restitution fine." The amount of the fine "shall be set at the discretion of the court and commensurate with the seriousness of the offense," but (as in effect at the time defendant was sentenced) may not be less than $200 and may be as much as $10,000 for felony convictions. (Former § 1202.4, subd. (b)(1); Stats. 2009, ch. 454, § 1, p. 2483.)

The statutory scheme also provides factors for the court to consider. "In setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. Those

losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime. Consideration of a defendant's inability to pay may include his or her future earning capacity." (§ 1202.4, subd. (d).) "Express findings by the court as to the factors bearing on the amount of the fine shall not be required." (*Ibid.*)

The court may, but is not required to "determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (§ 1202.4, subd. (b)(2).)

Defendants bear a heavy burden when attempting to show an abuse of discretion regarding a sentencing decision. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) Furthermore, we presume the trial court was aware of and followed the law. (*In re Julian R.* (2009) 47 Cal.4th 487, 498-499.)

Defendant argues that the "trial court violated the section 654 ban on multiple punishments by apparently calculating the amount of the $2,000 restitution fine and the $2,000 parole revocation fine based in part on two burglary convictions, which were incident to the arson convictions." There is, however, no evidence of this in the record, either in the probation report, which recommended the $2,000 restitution fine, or in the transcript of the sentencing hearing itself. Indeed, defendant's entire argument on this point is speculation.

Defendant relies on *People v. Le* (2006) 136 Cal.App.4th 925, in support of his argument. But in that case, the trial court ordered defendant "to pay a restitution fund fine of '$4,800 under the formula permitted by [section] 1202.4.'" (*Id.* at p. 932.) From this specific language, the court reasoned that the trial court had calculated the fine under section 1204, subdivision (b)(2), and included the convictions for which punishment had been stayed in calculating the fine. (*Ibid.*)

No such error is apparent here. The trial court did not state its reasons for the amount of the fine on the record, nor is it required to. (§ 1202.4, subd. (d); *People v. Dickerson* (2004) 122 Cal.App.4th 1374, 1379-1380.) It is impossible to know whether the trial court was using the permissive formula set forth in section 1204, subdivision (b)(2), or simply exercising its discretion to determine the amount of the fine, based on the seriousness of the offense and other relevant factors. "The very settled rule of appellate review is a trial court's order/judgment is presumed to be correct, error is never presumed, and the appealing party must affirmatively demonstrate error on the face of the record. [Citations.]" (*People v. Davis* (1996) 50 Cal.App.4th 168, 172.) This argument must therefore fail.

For the same reasons, defendant's argument that the court failed to exercise its own discretion merely adopted the probation report's recommendation regarding the amount of the fine must also fail. This is impossible to determine based on the record. Defendant argues that the fact that the recommendation and fine were identical "clearly demonstrates it abdicated responsibility to determine the appropriate amount of the restitution . . . ." It indicates no such thing. As we have already noted, the trial court is not required to make express findings on the record to explain the amount of the fine. (§ 1202.4, subd. (d).) Implying such a requirement to justify its actions if the court chooses the amount the probation report recommends would defeat the express language of the statute.

We find no error in the trial court's exercise of its discretion regarding the amount of the restitution fine. "'[T]he trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.) Because the court imposed the fine properly, we need not consider defendant's argument regarding ineffective assistance of counsel.

III

DISPOSITION

The judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.